THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WIDMON BUTLER,	)	
Employee	)	
	)	OEA Matter No.: 1601-0049-15
v.	)	
	)	
	)	Date of Issuance: November 7, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claim Specialist with the Metropolitan Police Department's ("Agency") Medical Services Branch ("MSB"). On July 22, 2013, while on duty, Employee accessed the medical records of Josephine Jackson, a civilian Agency employee, without authorization. Employee subsequently contacted the Director of the Office of Risk Management, stating that he was Ms. Jackson's attorney and that he was retained to ascertain the status of her workers' compensation claim.[1] Agency's Director of Human Resources was subsequently apprised of Employee's actions and forwarded the information to

[1] Employee admitted that he represented Ms. Jackson in a pro bono capacity in her workers' compensation claim against the Office of Risk Management and that he had written authorization to access Ms. Jackson's medical records. Employee further conceded that he understood and signed the Police & Fire Clinic's Acceptable Use Agreement related to his employment with Agency.

the Internal Affairs Department ("IAD") for investigation. Employee was placed on administrative leave with pay while IAD and the United States Attorney's Office ("USAO") conducted a review of the matter. On June 2, 2014, the USAO declined to prosecute Employee. On September 25, 2014, the IAD submitted its final investigative report to the Assistant Chief of Police.

As a result, Employee was charged with "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations: misfeasance; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources; using or authorizing the use of government resources for other than official business." Employee was also charged with violating Chapter 18, Section 1800.3 of the D.C. Personnel Regulations ("DCPR"), which prohibits District employees from engaging in outside employment or private business that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.[2] A Hearing Officer appointed to conduct an administrative review of the charges against Employee recommended that he be terminated. On February 5, 2015, Agency issued its Notice of Final Decision. Employee's termination was effective on February 6, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 6, 2015. In his appeal, Employee denied the charges against him and stated that his actions forming the basis of his termination were substantially performed while off-duty. Employee also asserted that he was innocent of each charge and specification and requested that he be reinstated with back pay and benefits.[3]

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[2] *Agency's Answer to Petition for Appeal*, Tab 2 (April 9, 2015). The charges levied against Employee included: Charge No. 1, Specifications Nos. 1, 2, and 3; and Charge No. 2, Specification No.1.
[3] *Petition for Appeal* (March 6, 2015).

Agency filed its Answer to the Petition for Appeal on April 9, 2015. It denied Employee's substantive claims and requested that an evidentiary hearing be held.[4] An OEA Administrative Judge ("AJ") was assigned to the matter on May 27, 2015. On September 11, 2015, the AJ issued a Third Order Convening a Prehearing Conference to assess the parties' arguments. After determining that there were material issues of fact in dispute, the AJ held a hearing, wherein the parties presented testimonial and documentary evidence in support of their positions.

After reviewing the hearing transcript, the AJ issued a Remand Order to Agency on October 18, 2016. According to the AJ, Agency failed to present any evidence during the hearing to justify imposing a penalty beyond what was allowable under the Table of Appropriate Penalties ("TAP") in Chapter 16 of the District Personnel Manual ("DPM"). Specifically, he stated that to support termination under the TAP, Agency was required to prove that Employee committed three offenses of misfeasance. Since the AJ believed that Agency only presented two instances wherein Employee was disciplined for misfeasance, the matter was remanded to determine the proper penalty to impose against Employee in accordance with the TAP.[5]

In response to the AJ's order, Agency identified a third offense of misfeasance committed by Employee. It stated that on November 8, 2013, Employee was issued a Notice of Final Decision on Proposed Suspension. Employee was suspended for thirty days based on a charge of misfeasance which occured on June 13, 2013. Thus, Agency opined that the penalty in this matter should be affirmed because Employee's termination was permitted under the TAP.[6]

The AJ issued an Initial Decision on November 30, 2016. First, he addressed Employee's contention that Agency violated D.C. Official Code § 5-1031, commonly referred to as the "90-

[4] *Agency Answer to Petition for Appeal* (April 9, 2015).
[5] *Remand Order to Agency* (October 27, 2016).
[6] *Agency's Response to Remand Order* (November 4, 2016)

day rule." This rule prohibits an adverse action commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause. However, the AJ noted that § 5-1031(b) contains a tolling exception to the rule if the act or occurrence is the subject of a criminal investigation by the USAO or the Metropolitan Police Department. Although the USAO resolved its investigation on June 2, 2014 when it issued a Letter of Declination, the AJ stated that Agency's IAD did not complete its own internal investigation until September 25, 2014. Since Agency commenced its adverse action against Employee less than ninety days after IAD concluded its investigation, the AJ held that the 90-day rule was not violated.

Next, the AJ found that there was substantial evidence in the record that Employee accessed his private law client's medical records using Agency's resources without authorization. The AJ was unpersuaded by Employee's testimony based on his demeanor and lack of consistency. In addition, he determined that Employee's use of Agency's resources for his personal law practice constituted misfeasance. The AJ stated that Employee's on-duty actions constituted outside business activities that presented a conflict of interest with the fair and impartial performance of Employee's officially assigned duties. He also noted that Agency provided sufficient evidence to support a charge of dishonesty because Employee lied about accessing Ms. Jackson's medical records. With respect to the allegation that Employee utilized Agency's place of business, telephone, and fax number to advertise his private law practice on two websites, the AJ concluded that Agency failed to present any evidence to substantiate its claims. Notwithstanding this finding, the AJ concluded that Employee's misconduct constituted

an on-duty or employment related act or omission that interfered with the efficiency and integrity of government operations.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's termination action, the AJ identified two instances, including the one forming the basis of this appeal, in which Agency sustained charges of misfeasance against Employee. While Employee argued that Agency should not have been afforded an opportunity to present evidence of a third offense of misfeasance because the record was closed at the conclusion of the hearing, the AJ cited to OEA Rule 630.1, which provides that an AJ may reopen the record to receive further evidence or arguments at any time prior to the issuance of the Initial Decision. Furthermore, he noted that no orders were issued to close the record after the hearing was concluded. Thus, Agency's November 4, 2016 Response to [the] Remand Order was permissible as part of the record. In sum, the AJ determined that Agency presented evidence of three charges of misfeasance against Employee. Accordingly, he held that Agency provided evidence of three charges of misfeasance and that a third charge carries a penalty of termination under the TAP.

Lastly, the AJ dismissed Employee's contention that Agency failed to consider the *Douglas* factors, discussed *infra*, when selecting the appropriate penalty.[7] However, after

[7] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Although not an exhaustive list, the factors that an agency may consider are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

reviewing the charging documents, including the Notice of Final Decision, the AJ surmised that Agency adequately considered Employee's "behavior in relation to his job position and duties, veracity, timeliness, and signed agreement with Agency's Acceptable Use Agreement…." Therefore, he found that Agency carefully considered the *Douglas* factors, although it did not actually identify the factors as such. Moreover, the AJ stated that OEA has held that the failure to discuss the *Douglas* factors does not amount to a reversible error. Thus, he concluded that Agency met its burden of proof with respect to the charges levied against Employee and held that Agency did not abuse its managerial discretion in selecting the appropriate penalty. Accordingly, Employee's termination was upheld.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on January 3, 2017. He challenges several of the AJ's findings as a basis for granting his petition. First, Employee argues that his termination was unreasonable because Agency should have been estopped from using a prior charge of misfeasance in support of its decision to

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3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties; The notoriety of the offense or its impact upon the reputation of the agency;
8. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. Potential for the employee's rehabilitation;
10. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
11. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

terminate him. Employee also argues that Agency violated his procedural administrative due process rights by failing to appropriately consider the *Douglas* factors. In addition, he states that the AJ erred in interpreting the 90-day rule. Employee further asserts that his termination was conducted in bad faith and was a result of harassment and retaliation. Lastly, he believes that Agency failed to meet its burden of proof in sustaining a charge of misfeasance in this case. As a result, Employee posits that the Initial Decision was not based on substantial evidence.[8]

Agency filed a Response to Employee's Petition for Review on October 3, 2017. It argues that Employee's Petition for Review should be denied because he failed to articulate any cognizable grounds to overturn the Initial Decision. Agency further states that Employee has failed to show that the AJ's findings were not supported by substantial evidence. Lastly, Agency submits that the AJ correctly concluded that it did not violate the 90-day rule. Therefore, it requests that the Board deny Employee's Petition for Review.[9]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or

[8] *Petition for Review* (June 3, 2017). Employee also filed a Supplement to Petition for Review on July 26, 2017, wherein he offered additional documentation purporting to support his argument that Agency acted in bad faith during the USAO's investigation into his conduct.

[9] Agency did not submit its response until approximately nine months after Employee filed his petition (*See* OEA Rule 633.2). However, Employee's Certificate of Filing of his Petition for Review does not indicate that it was properly served to Agency. Therefore, this Board will consider the merits of Agency's arguments.

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Reasonableness of Penalty

The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Employee argues that the AJ improperly permitted Agency to submit evidence of a third charge of misfeasance in support of its termination action because the matter was previously settled in October of 2016 after he filed a Whistleblower lawsuit. In support thereof, Employee offers newly-presented evidence of a complaint he filed in D.C. Superior Court on August 2, 2012. The complaint was subsequently settled and dismissed on October 24, 2016.[10]

However, the complaint that Employee cites to asserts that Agency violated the Whistleblower Protection Act when it suspended him for twenty-five days in July of 2012 for usurping the chain of command in a work-related matter. This is a separate and distinct charge from what Agency submitted in response to the AJ's Remand Order. Thus, Employee's argument is misplaced, as Agency did not rely on a matter that was previously settled to support its termination action.

Consequently, the Board finds that Employee's termination is based on three charges of misfeasance. The AJ did not err in finding that termination was appropriate under the

[10] *See Butler v. District of Columbia*, 2012 CA 006293 B (D.C. Super. Ct. 2016).

circumstances. We further conclude that Agency acted reasonably within the parameters established in the TAP, and that it did not abuse its discretion in choosing the penalty.[11]

Douglas Factors

Next, Employee asserts that Agency failed to properly consider the *Douglas* factors in selecting the appropriate penalty. In *Douglas v. Veterans Administration*, the Merit Systems Protection Board, OEA's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. In applying the factors, the MSPB cautioned that "[n]ot all of these factors will be pertinent in every case and frequently in the individual case, some of the pertinent factors will weigh in the [employee's] favor, while others may not, or may even constitute aggravating circumstances." Thus, the selection of an appropriate penalty must include a balancing of the relevant factors in an individual case.[12]

Here, Employee exercised his right to meet with Hearing Officer, Commander Keith Williams, to discuss Agency's proposed adverse action. Following the October 27, 2014 meeting, Commander Williams issued his Notice of Final Decision, sustaining the charges against Employee. In recommending the penalty of termination, Commander Williams highlighted several factors in support of his conclusion, including a determination that Employee's misconduct was intrinsically relevant to his position, job duties and/or job activities. Commander Williams further noted that Employee's actions were a clear violation of Agency rules. He also stated that Agency's improper identification of the "Acceptable Use Agreement" in its documents did not diminish Employee's culpability for his actions. After reviewing the

[11] It bears noting that Employee believed that the record was closed at the conclusion of the evidentiary hearing. However, there is no evidence in the record to show that the AJ ordered the record to be closed prior to issuing his Initial Decision. Furthermore, the AJ had the discretion to keep the record open, or to re-open the record for the purpose of receiving further evidence prior to issuing his decision. *See* OEA Rules 629 and 630. In addition, under § DCPR 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.
[12] *Id.*

facts and circumstances outlined in the charging and investigative documents, Commander Williams recommended that Employee be terminated from his position. While Agency did not specifically identify its considerations as "*Douglas* factors" in Employee's final notice, it is clear from the record that the reviewing officer considered some, but not all, of the elements enumerated in *Douglas*. This Board agrees with the AJ's conclusion that Agency carefully presented its justification for recommending the penalty of termination. As such, we will not disturb his finding.

90-Day Rule

Employee believes that the AJ erred in interpreting the 90-day rule. Thus, he believes that this Board should reverse Agency's termination action. D.C. Official Code § 5-1031 provides the following regarding the 90-day rule:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
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> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

It is well-settled that the 90-day deadline is a mandatory, rather than directory provision. [13] Therefore, any violation of the statute by an agency would result in a reversal of the adverse

[13] *McHugh v. Department of Human Services,* OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services,* OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority,* OEA Matter No. 1601-0062-98, p. 16 (May 24, 2000); *Velerie Jones-Coe v. Department of Human*

action. The only exception to this rule lies within subsection (b) of the statue. Under § 5-1031(b), the ninety-day deadline shall be tolled until the conclusion of the criminal investigation.

In *Timothy Ebert v. Metropolitan Police Department,* OEA Matter No. 1601-0223-98, *Opinion and Order on Petition for Review* (December 31, 2002), this Board held that "the date of the declination letter is an objective 'bright line' signaling the end of a criminal investigation." The Board reasoned that agencies should not have to guess about the date the deadline begins to run because, in accordance with the statute, it is tolled as long as there is an on-going criminal investigation. Moreover, the OEA Board has previously determined that a formal decision declining prosecution concludes the investigation.[14] The Superior Court for the District of Columbia held in *District of Columbia v. District of Columbia Office of Employee Appeals and Robert L. Jordan,* 883 A.2d 124 (2005), that "the natural meaning of the statutory language . . . is that the 'conclusion of a criminal investigation' must involve action taken by an entity with prosecutorial authority—that is, the authority to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that charges should not be filed."

In this case, the act allegedly constituting cause occurred on July 22, 2013, when Employee used his Agency log-in and password credentials to check the status of his personal law client's medical records without authorization from a supervisor. Agency was not apprised of Employee's actions until September 12, 2013, when ORM informed the Human Resources Department of Employee's misconduct. The tolling exception under D.C. Official Code § 5-1031(b) was triggered because the allegations against Employee were the subject of a criminal investigation by the United States Attorney's Office. However, on June 2, 2014, the United

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Services, OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department,* OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department,* OEA Matter No. 1601-0147-06, (March 26, 2007).

[14] *Sholanda Miller v. Metropolitian Police Department,* OEA Matter No. 1601-0325-10. *Opinion and Order on Petition for Review* (April 14, 2015)

States Attorney made a decision not to charge Employee with a criminal offense after reviewing the evidence.[15] Therefore, based on the holdings in *Ebert* and *Jordan*, the conclusion of the criminal investigation occurred with the Letter of Declination. Agency subsequently had ninety business days to serve Employee with written notice of proposed adverse action. Agency issued its Advance Notice of Proposed Termination on October 6, 2014, eighty-eight business days after it proposed Employee's termination. Accordingly, Agency did not violate the 90-day rule and was compliant with the requirements of D.C. Official Code § 5-1031(b).

Burden of Proof

According to Employee, Agency failed to meet its burden of proof in this matter because it failed to produce evidence to show that the termination action was taken for cause. He claims that "best evidence, recordings/transcripts of witness interviews were ignored" and that "all pertinent issues of law and fact on record…were not properly raised and addressed, for example, documentation of a records breach, monetary incentives for representation, unit co-employees in similar worse situations unpunished and union membership protections."[16] In addition, Employee states that Agency acted in bad faith, exhibited malice, harassment and retaliated against him.

OEA Rule 628.1 provides that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue. This Board disagrees with Employee's assertions and finds that the AJ correctly determined that Agency met its burden of proof with respect to the charge of misfeasance.

[15] *Agency Answer to Petition for Appeal*, Tab 7.
[16] *Petition for Review*.

After adducing both documentary and testimonial evidence from both parties, the AJ concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. While Employee takes exception with the AJ's conclusions, there is no evidence in the record to indicate that the AJ failed to consider all of the evidence that was submitted during the course of this appeal. He found Agency's witnesses to be credible in supporting the claim that Employee impermissibly accessed his law client's medical records using Agency resources. Employee's misconduct violated Agency's internal rules and subjected him to legal and administrative charges.

Conversely, the AJ found Employee's testimony to be inconsistent and lacking in credibility. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[17]

Based on the foregoing, we are unpersuaded by each argument presented in Employee's Petition for Review. Employee was afforded the opportunity to present evidence in support of each of his arguments. However, he could not substantiate these claims. Thus, this Board finds that the AJ reasonably concluded that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause. We further note that many of Employee's arguments are

[17] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

merely disagreements with the AJ's findings of fact and conclusions of law. These disagreements are not a valid basis for appeal.[18]

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[19] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. Accordingly, Agency's adverse action was taken for cause and the penalty of termination was appropriate under the circumstances. Consequently, Employee's Petition for Review must be denied.

[18] *See Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014); *Gwendolyn Gilmore v. District of Columbia. Public Schools*, OEA Matter No. 1601- 0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); and *Garnetta Hunt v. Department of Corrections,* OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015).

[19] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

_____
P. Victoria Williams

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Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.